

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

\_\_\_\_\_ )  
In re: )  
 )  
Zoo Med Laboratories, Inc. ) FIFRA Appeal No. 99-10  
 )  
Docket No. FIFRA-09-0886-C-98-11 )  
\_\_\_\_\_ )

**ORDER DENYING MOTION FOR INTERLOCUTORY REVIEW**

On September 13, 1999, the United States Environmental Protection Agency Region IX ("Complainant") filed a motion for interlocutory appeal with the Environmental Appeals Board ("Board") from the July 28, 1999 ruling of Administrative Law Judge William B. Moran ("Presiding Officer") in the above-referenced matter. Zoo Med Laboratories, Inc. ("Zoo Med") filed its opposition to EPA's motion for interlocutory appeal on September 28, 1999.

The Presiding Officer ruled, upon consideration of Complainant's Motion for Accelerated Decision and Zoo Med's Cross-Motion for Accelerated Decision, that Counts XI, XII, XIII and XIV of Complainant's second amended Complaint should be dismissed under the doctrine of *res judicata*. See Orders on Motions, at 9-13 (ALJ, July 28, 1999) ("July 1999 Order"). On August 9, 1999, Complainant filed a motion, pursuant to 40 C.F.R.

§ 22.29(a), seeking "Certification of Interlocutory Appeal" from the Presiding Officer's July 1999 Order. Zoo Med filed its Opposition to Complainant's Motion on August 24, 1999. On August 27, 1999, the Presiding Officer denied Complainant's motion and ruled that an immediate appeal would not materially advance the ultimate termination of the proceeding. See Order Denying Complainant's Motion for Interlocutory Appeal, at 3 (ALJ, Aug. 27, 1999) ("August 1999 Order").

Because certification was denied by the Presiding Officer, Complainant seeks review of the July 1999 Order and August 1999 Order under 40 C.F.R. § 22.29(c). Pursuant to 40 C.F.R. § 22.29(c), when the Presiding Officer declines to certify an order or ruling for review, interlocutory appeal will be granted by the Board only "in exceptional circumstances," and where the Board determines "that to delay review would be contrary to the public interest." *Id.*; *In re Microban Prods. Co.*, FIFRA Appeal No. 99-1, at 2 (EAB, May 10, 1999) (Order Denying Motion for Interlocutory Review). Complainant has asserted that the Board should take review now because the issue on appeal is one of first impression and concerns an important issue of law and policy.

In this case, Complainant filed a complaint against Zoo Med involving fifteen counts under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* As

reflected in Complainant's second amended Complaint, Complainant alleged twelve sales of unregistered pesticides, two sales of adulterated pesticides, and one failure to register a facility as a pesticide-producing facility. See July 1999 Order, at 1. Of the fifteen counts, four (Counts XI, XII, XIII, and XIV) involve the sale of unregistered pesticides at pet supply stores in New York. *Id.* at 3-4. In his July 1999 Order, the Presiding Officer dismissed Counts XI - XIV, "under the doctrine of *res judicata* by virtue of the FIFRA statutory provisions discussed above, and the cooperative agreement between EPA and the State of New York which emanated from those provisions." *Id.* at 13.

Complainant now seeks review of the issue of whether Sections 23, 26 and 27 of FIFRA, and a cooperative agreement between Complainant and the New York Department of Environmental Conservation ("NYDEC") for fiscal year 1997 can serve as the legal basis for the dismissal of Counts XI - XIV of the second amended Complaint. See Memorandum in Support of Complainant's Motion for Interlocutory Review, at 4 (Sept. 13, 1999) ("Complainant's Motion"). Complainant's showing of extraordinary circumstances relies primarily on the contention that an additional hearing would be required if the Board were to deny review now and the Presiding Officer's preliminary decision were reversed in a subsequent appeal to the Board. See Complainant's Motion, at 16. Zoo Med contends that no additional hearing would

be required because the record on appeal, if any, would be adequate for the Board to address the issue dispositively. Motion in Opposition to Complainant's Motion, at 7 (Sept. 28, 1999) ("Motion in Opposition").

We are not persuaded that exceptional circumstances, as contemplated by 40 C.F.R. § 22.29(c), exist here. First, as the Presiding Officer observed, Zoo Med, while arguing against liability on *res judicata* grounds, has not denied the allegations in the complaint underlying these Counts. Thus, if we were to later set aside the Presiding Officer's *res judicata* ruling, it does not appear that a hearing would be necessary to determine Zoo Med's liability. See July 1999 Order, at 2-3; August 1999 Order, at 2.

The Presiding Officer further concluded, and we agree, that the Board generally possesses the authority to assess an appropriate penalty on appeal, "without the necessity for remand." See August 1999 Order, at 2, citing *In re Roger Antkiewicz & Pest Elimination Prods. of America, Inc.*, FIFRA Appeal Nos. 97-11 & 97-12, slip op. at 27, 8 E.A.D. \_\_\_ (EAB, March 26, 1999) (Presiding Officer's dismissal of a Count reversed, and appropriate penalty applied by the Board). Here, Zoo Med has expressed the intent to "present evidence concerning its distribution in New York of the products that are at issue and the penalty paid by Zoo Med to the NYDEC" in challenging the

penalty assessments for the Counts that were not dismissed. See Motion in Opposition at 7. Given this scenario, it appears that an ample record will exist to not only establish liability, but also to determine an appropriate penalty for the dismissed Counts should the Board review the Presiding Officer's July 1999 Order on appeal.

In sum, the Board is not convinced that exceptional circumstances exist to grant Complainant's request for interlocutory review. Complainant's Motion for Interlocutory Appeal is therefore denied. This order does not, nor should it be construed to, rule on the merits of the Presiding Officer's July 1999 Order.

So ordered.

Dated: 11/23/99

ENVIRONMENTAL APPEALS BOARD

By: \_\_\_\_\_/s/\_\_\_\_\_  
Scott C. Fulton  
Environmental Appeals Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order in the matter of Zoo Med Laboratories, Inc., FIFRA Appeal No. 99-10, were sent to the following persons in the manner indicated:

By Certified Mail  
Return Receipt Requested:

Michael R. Neilson, Esq.  
Lynn L. Bergeson  
Bergeson & Campbell, P.C.  
1300 Eye Street, N.W.  
Suite 1000 West  
Washington, DC 20005

David M. Jones, Esq.  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
Mail Code ORC-2  
San Francisco, CA 94105-3901

Dated: 11/23/99

\_\_\_\_\_/s/  
Annette Duncan  
Secretary